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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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12 FLOYD A. WRIGHT and ARTHUR  
13 STIGALL,

14 Plaintiffs, CIV. S-04-1637 WBS PAN PS

15 v.

16 DONALD M. SENICK, HAROLD E. ORDER and  
17 MARTIN, and unknown parties named FINDINGS AND RECOMMENDATIONS  
18 as DOES 1-10 claiming any interest  
19 in the real property described in  
20 the complaint,

21 Defendants.  
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25 Pending before this court are plaintiffs' motion to  
26 remand, defendant Harold Martin's motion to dismiss, and Martin's  
motion to compel plaintiff Arthur Stigall to attend his  
deposition and for sanctions. For the following reasons,  
plaintiffs' motion to remand is denied, and I recommend this  
action be dismissed, rendering moot defendant's motion to compel

1 Stigall's attendance at deposition and for sanctions.

2 Defendant Donald M. Senick has not been served in this  
3 action.

4 Plaintiff Floyd A. Wright has informed the court he is  
5 physically and verbally infirm due to a stroke, requests no  
6 appearances before the court, and joins Stigall's motion to  
7 remand.

8 This action is, effectively, between Stigall and Martin,  
9 and is but the most recent of several state and federal actions<sup>1</sup>  
10 challenging the sale of real property located at 5792 Montclair  
11 Avenue, Marysville, California ("Montclair"), by the Internal  
12 Revenue Service ("IRS") at auction to satisfy a lien for taxes  
13 owed by Marvin Baysel Edwards.

14 Stigall filed the complaint April 30, 2004, in Yuba  
15 County Superior Court, asserting jurisdiction pursuant to  
16 California Code of Civil Procedure § 760.040 (equitable actions

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18 <sup>1</sup> The following additional cases have been filed in this court alone:  
19 Edwards v. United States, Don Senick and Bronson Lyle, 96-cv-0477-EJG-JFM,  
20 filed 3/08/96 (dismissed 2/10/97 for lack of standing (Edwards failed to  
21 demonstrate ownership interest in the "M.B. Edwards Trust); affirmed on appeal  
22 2/9/98); Edwards and Stigall v. IRS, 98-cv-1002-LKK-DAD (PS), filed 6/02/98  
23 under Freedom of Information Act (dismissed by stipulation of parties  
24 7/23/99); Edwards and Stigall v. Martin, Senick, New Century Mortgage Company,  
25 and First American Title Insurance Company, 01-cv-2138-LKK-GGH (PS), removed  
26 from state court 11/20/01 (remanded to state court 12/21/01 for lack of  
federal jurisdiction due to defendants' failure to articulate rationale);  
Edwards and Stigall v. Martin, Senick and IRS Officer Barbara Lane, 01-mc-  
00238-MLS-GGH (PS), removed from state court 9/18/01 (dismissed as moot  
5/29/02); Edwards and Stigall v. Martin, Senick, New Century Mortgage Company,  
and First American Title Insurance Company, 02-cv-00450-DFL-GGH (PS), removed  
from state court 2/27/02 (dismissed 11/04/02 for failure to join indispensable  
party (IRS)); and Edwards v. US Dept of Treasury, et al, 03-cv-0958-MCE-DAD  
(PS), complaint for writ of mandate filed 5/08/03 (dismissed for insufficient  
service of process).

1 to quiet title). The complaint, entitled "Complaint for Quiet  
2 Title to Set-A-Side a Void Deed," asserts Montclair was sold  
3 "pursuant to an invalid Internal Revenue Service auction." The  
4 court's records and files show that in May 1983 the taxpayer,  
5 Edwards, conveyed Montclair to "M.B. Edwards Trust" but continued  
6 to live on the property as a "tenant." In 1992 and 1995 the IRS  
7 recorded notices of federal tax liens against the trust "as the  
8 Nominee, Alter Ego, or Transferee of Marvin B. Edwards." In  
9 September 1995, Montclair was auctioned by IRS to Senick to  
10 satisfy Edwards' tax liability. See Exhibit B to Removal Notice  
11 (First Amended Complaint filed February 2002 in Yuba County  
12 Superior Court in CV 99-445). In this action, plaintiffs allege  
13 Martin is the recipient of a "void deed" from Senick; that  
14 Wright holds title to Montclair as Trustee of M.B. Edwards Trust;  
15 and Stigall is "successor in interest of Wright pursuant to a  
16 grant deed from Wright."

17 On August 12, 2004, Martin removed this action to this  
18 court pursuant to 28 U.S.C. § 1331 ("The district courts shall  
19 have original jurisdiction of all civil actions arising under the  
20 Constitution, laws, or treaties of the United States"), and 28  
21 U.S.C. § 1441(b) (permitting removal of actions to the district  
22 courts based on original subject matter jurisdiction). Martin  
23 asserts, inter alia, that the IRS is an indispensable party and  
24 plaintiffs' claims are precluded on res judicata grounds by this  
25 court's prior ruling in Edwards et al., v. Martin et al., Civ-S-  
26 02-0450 DFL GGH PS, affirmed by the Ninth Circuit on appeal.

1 On August 24, Stigall filed an opposition asserting,  
2 inter alia, that "[p]laintiff is the master of the complaint"  
3 (Opposition, at p. 1) and has purposefully relied on state law in  
4 order to avoid federal court jurisdiction.

5 A threshold issue is presented by plaintiff's assertion  
6 removal is improper because not made within the 30-day limitation  
7 of 28 U.S.C. § 1446(b). See Maniar v. FDIC, 979 F.2d 782, 786  
8 (9th Cir. 1992) (untimely removal is a procedural defect). 28  
9 U.S.C. § 1446(b) provides in pertinent part:

10 The notice of removal of a civil action or proceeding shall  
11 be filed within thirty days after the receipt by the  
12 defendant, through service or otherwise, of a copy of the  
13 initial pleading setting forth the claim for relief upon  
14 which such action or proceeding is based, or within thirty  
15 days after the service of summons upon the defendant if such  
16 initial pleading has then been filed in court and is not  
17 required to be served on the defendant, whichever period is  
18 shorter.

19 "The burden of establishing federal jurisdiction falls on  
20 the party invoking removal." Harris v. Provident Life and  
21 Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994) (quoting  
22 Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 771 (9th  
23 Cir. 1986)). Removal statutes are strictly construed against  
24 removal. See Libhart v. Santa Monica Dairy Co., 592 F.2d 1062,  
25 1064 (9th Cir. 1979). "Federal jurisdiction must be rejected if  
26 there is any doubt as to the right of removal in the first  
instance." Gaus v. Miles, 980 F.2d 564, 566 (9th Cir. 1992).

27 Martin states removal is timely because noticed within 30  
28 days after he received the complaint. Notice of Removal, at  
29 para. 2. He further states, "There is no evidence that a summons

1 was issued or served, and therefore the purported service of the  
2 complaint may be defective." Id. Stigall responds that on June  
3 24, 2004, he mailed to Martin the complaint and summons by  
4 certified mail, return receipt requested, and on June 6 Martin  
5 "signed the return Receipt." Opposition to Removal and Request  
6 for Remand, p. 2; see also Plaintiffs' Joint Status Report, at p.  
7 2 (same representation without reference to dates). Stigall does  
8 not provide a copy of the receipt and obscures his presentation  
9 of the facts by asserting (1) he sent a copy of the summons and  
10 complaint to Martin's attorney on September 24, 2004, (2)  
11 "[s]ervice of process was also attempted at Martin's home address  
12 but was not successful" and (3) "plaintiff's [sic] may request  
13 publication if the court finds that the service to Martin was  
14 insufficient." Plaintiff's Joint Status Report, at p. 2. Not  
15 until November 3, 2004, did plaintiffs file proof of personal  
16 service of summons and complaint upon Martin. See Docket Entry  
17 #30.

18 Martin has also failed to provide evidence in support of  
19 his representation. However, Stigall's conflicting assertions  
20 and continued doubt regarding the adequacy of service weigh in  
21 favor of concluding Martin has met his burden of demonstrating  
22 the notice of removal was filed within 30 days of receiving the  
23 complaint "through service or otherwise" and therefore within the  
24 deadline of 28 U.S.C. 1446(b). Senick's failure to join in the

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1 notice of removal is not material.<sup>2</sup>

2 The next inquiry is whether the complaint comes within  
3 the original subject matter jurisdiction of this court and is  
4 therefore appropriate for removal pursuant to 28 U.S.C. §§ 1331  
5 and 1441(b). Martin asserts the IRS is an indispensable party  
6 and that plaintiffs' complaint and choice of parties is no more  
7 than "artful pleading" designed to obscure federal claims that  
8 have already been ruled upon.

9 The question of "artful pleading" was addressed by Judges  
10 Levi and Hollows in Edwards and Stigall v. Martin, Senick, New  
11 Century Mortgage Company, and First American Title Insurance  
12 Company, 02-CV-0450 DFL GGH PS, which challenged defendants'  
13 transfer of Montclair notwithstanding the purportedly invalid IRS  
14 lien and sale. In rejecting plaintiffs' contention that case  
15 should be remanded to state court, Judge Hollows found (Order and  
16 Findings and Recommendations filed July 3, 2002, at p. 4):

17 Although the IRS is not named as a defendant and plaintiffs  
18 allege no federal claims per se, plaintiffs are essentially  
19 attacking the federal court judgment permitting the IRS to  
20 forfeit the Montclair property for failure to pay income  
21 taxes. Plaintiffs' amended complaint is a product of  
22 "artful pleading." Bright v. Bechtel, 780 F.2d 766 (9th  
23 Cir. 1986). . . . [P]laintiffs are challenging the authority  
24 of the IRS to forfeit the property for the failure to pay  
25 taxes by arguing that defendants should have known that the  
26 IRS lacked authority to impose the lien. Each and every

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23 <sup>2</sup> All defendants must join a notice of removal provided they are  
24 properly joined and served in the action. Emrich v. Touche Ross & Co., 846  
25 F.2d 1190, 1193, n. 1 (9th Cir. 1988) (citations omitted); see also Parrino v.  
26 FHP, Inc., 146 F.3d 699, 703 (9th Cir. 1998). "Our circuit rule is that a  
party not served need not be joined; the defendants summonsed can remove by  
themselves." Salveson v. Western States Bankcard Association, 731 F.2d 1423,  
1429-1430 (9th Cir. 1984) (citation omitted).

1 state court claim depends upon plaintiffs' assertions that  
2 the IRS acted improperly and defendants should have  
3 understood this. This is quintessential artful pleading.  
4 Accordingly, the court finds that since this action raises a  
5 federal question, by way of artful pleading, removal was  
6 proper.

7 The same principles and analysis apply in this case.  
8 Stigall's repeated attempt to "quiet title" in a state court  
9 action continues to turn on the validity of the IRS sale.  
10 Stigall concedes as much by asserting in his complaint, "[s]tate  
11 courts have jurisdiction to determine the validity of federal tax  
12 sales." Complaint, at p. 2. While Stigall has sought expressly  
13 to avoid the assertion of a federal claim ("The IRS is not a  
14 party of or to this complaint and has no interest in Montclair,"  
15 "There is no United States (Federal) law prohibiting this action  
16 in the California Courts," id., at pp. 2, 3), the validity of the  
17 IRS sale is central to this dispute and cognizable pursuant only  
18 to the original jurisdiction of the federal district courts.<sup>3</sup>  
19 Thus, as in 02-CV-0450 DFL GGH PS, this court finds Stigall's  
20 action comes within the original jurisdiction of this court and  
21 its removal from state court was proper.

22 Accordingly, plaintiff's motion to remand is denied.

23 The essential federal subject matter underlying this

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24 <sup>3</sup> 28 U.S.C. § 1346(a)(1) provides: "The district courts shall have  
25 original jurisdiction, concurrent with the United States Court of Federal  
26 Claims, of . . . Any civil action against the United States for the recovery  
of any internal-revenue tax alleged to have been erroneously or illegally  
assessed or collected, or any penalty claimed to have been collected without  
authority or any sum alleged to have been excessive or in any manner  
wrongfully collected under the internal-revenue laws."

1 action renders the IRS an indispensable party,<sup>4</sup> and a wrongful  
2 levy action pursuant to 26 U.S.C. § 7426(a)(1)<sup>5</sup> the exclusive  
3 remedy.<sup>6</sup>

4 Accordingly, Stigall's action against Martin is improper  
5 and should be dismissed. Martin's motion to compel deposition  
6 and for sanctions should be denied as moot.

7 These findings and recommendations should not be read to  
8 encourage further suits regarding the ten-year-old IRS sale of  
9 the Montclair property. Absent a strong showing of merit based  
10 on facts not previously considered and ruled upon by other state  
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12 <sup>4</sup> Fed. R. Civ. P. 19(a) provides in pertinent part: "A person who is  
13 subject to service of process and whose joinder will not deprive the court of  
14 jurisdiction over the subject matter of the action shall be joined as a party  
15 in the action if (1) in the person's absence complete relief cannot be  
16 accorded among those already parties, or (2) the person claims an interest  
17 relating to the subject of the action and is so situated that the disposition  
18 of the action in the person's absence may (i) as a practical matter impair or  
19 impede the person's ability to protect that interest or (ii) leave any of the  
20 persons already parties subject to a substantial risk of incurring double,  
21 multiple, or otherwise inconsistent obligations by reason of the claimed  
22 interest. If the person has not been so joined, the court shall order that  
23 the person be made a party."

19 <sup>5</sup> 26 U.S.C. § 7426(a)(1) provides: "If a levy has been made on property  
20 or property has been sold pursuant to a levy, any person (other than the  
21 person against whom is assessed the tax out of which such levy arose) who  
22 claims an interest in or lien on such property and that such property was  
23 wrongfully levied upon may bring a civil action against the United States in a  
24 district court of the United States. Such action may be brought without  
25 regard to whether such property has been surrendered to or sold by the  
26 Secretary."

23 <sup>6</sup> As Judge Hollows found in 02-CV-0450 DFL GGH PS, "Pursuant to § 7426,  
24 plaintiff Stigall may only challenge the validity of the IRS levy on the  
25 Montclair property and its subsequent sale by filing a civil action against  
26 the United States in district court. Therefore, his suit against the  
defendants named in this action [any defendants other than the IRS] is not  
proper." Order and Findings and Recommendations filed July 3, 2002, in 02-CV-  
0450 DFL GGH PS, at p. 6.



or federal actions, further actions on this dispute filed in or removed to this court should be evaluated for abuse of the judicial process (see Fed. R. Civ. P. 11(b)), and appropriate sanctions (Fed. R. Civ. P. 11(c)).

These findings and recommendations are submitted to the Honorable William B. Shubb, the United States District Judge assigned to this case. 28 U.S.C. § 636(b)(1). Written objections may be filed within ten days after being served with these findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: May 25, 2005.

/s/ Peter A. Nowinski  
PETER A. NOWINSKI  
Magistrate Judge